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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ, Petitioner, **v.** **M. MARTEL, Warden,** Respondent.	08-0816 JLS (CAB) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS** The Honorable Cathy Ann Bencivengo

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INTRODUCTION

Fernandez is in prison for molesting his daughter over a four year period. He raises two claims concerning evidence presented at his trial. First, Fernandez argues he was denied due process by the admission of evidence concerning prior uncharged sexual assaults he committed on his wife and sister-in-law. This claim is not the proper subject of federal habeas review since the Supreme Court has never held propensity evidence violates due process. Nonetheless, admitting this evidence did not violate Fernandez's right to due process since a permissible inference could be drawn from it. Fernandez also claims his due process right to present a defense was denied by partially excluding testimony of his expert witness. This claim should also be denied because it was reasonably rejected in the state Court of Appeal upon finding the expert's testimony improperly rendered an opinion on the victim's credibility. Fernandez should be denied habeas relief.

STATEMENT OF THE CASE

On February 9, 2006, a San Diego County jury found Fernandez guilty of three counts of aggravated sexual assault of a child (Cal. Penal Code § 269), six counts of committing a forcible lewd act upon a child (Cal. Penal Code § 288(b)(1)), and one count of committing a lewd act upon a child fourteen or fifteen years old (Cal. Penal Code § 288(c)(1)). (Lodgment 1 at 104-13, 236-38.) On May 19, 2006, the trial court sentenced Fernandez to fifteen years to life plus eight years and eight months in prison. (Lodgment 1 at 185-89, 244-45.)

Fernandez filed a direct appeal in the California Court of Appeal, Fourth Appellate District, Division One, alleging he was denied due process by the admission of evidence of prior uncharged sexual assaults, and the partial exclusion of the testimony of the defense expert Dr. Constance Dalenberg. (Lodgment 19.) On June 21, 2007, the Court of Appeal affirmed the judgment. (Lodgment 22.)

On July 13, 2007, Fernandez filed a Petition for Review in the California Supreme Court, alleging the same two claims: (1) he was denied due process by the erroneous admission of evidence of alleged prior sexual assaults on his wife and sister-in-law, and (2) he was denied due process by the court's partial exclusion of the testimony of defense expert Dr. Constance Dalenberg. (Lodgment 23.) On August 29, 2007, the California Supreme Court summarily denied Fernandez's Petition for Review. (Lodgment 24.)

On February 15, 2008, Fernandez filed the instant Petition in the United States District Court for the Eastern District of California, raising the same claims he presented in his Petition for Review. On April 29, 2008, this matter was transferred to this Court. On May 8, 2008, this Court ordered Respondent to file a response to Fernandez's Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

Respondent adopts the Statement of Facts from the California Court of Appeal's opinion. (Lodgment 22 at 2-5.) *See, e.g.*, *Dillard v. Roe*, 244 F.3d 758, 761 n.1 (9th Cir. 2001) ("The facts are taken from the opinion by the California Court of Appeal"); *DePetris v. Kuykendall*, 239 F.3d 1057, 1059-61 (9th Cir. 2001) (quoting the California Court of Appeal's "recitation of facts"); *see also* 28 U.S.C. § 2254(e)(1) (the state court's determination of the facts is presumed to be correct). Further development of the facts, with reference to the trial record, may be found in the parties' briefs filed in the direct appeal. (Lodgments 19-21.) The California Court of Appeal found as follows:

FACTUAL AND PROCEDURAL BACKGROUND

> This case involves Fernandez's ongoing sexual abuse of his daughter E. from September 2000 to June 2004 when E. was between the ages of 10 and 14.
>
> E.'s testimony revealed that the sexual abuse commenced during a time period when her mother was employed outside the home and Fernandez was no longer employed because of a work-related injury. Typically, the sexual assaults would occur during the afternoon after school when Fernandez would arrange to be alone with E. by sending E.'s brother to the store. In later years, the sexual abuse occurred at night when the other family members were sleeping. During many of the incidents, Fernandez's pattern of behavior was to touch E.'s breasts, have sexual intercourse with her, ejaculate into a tissue, and threaten to hurt the family if she reported the assaults.
>
> The first assault occurred when the family lived in a home on Logan Avenue and E. was 10 years old. Fernandez touched E.'s breasts over her clothes while they were in the kitchen, and then took her to the bedroom where he removed her clothes and had sexual intercourse with her. About two months later, Fernandez touched her breasts while she was in the bathroom, and then took her to the bedroom and had sexual intercourse with her. E. estimated that Fernandez had sexual intercourse with her on two other occasions while they were living on Logan Avenue.
>
> Fernandez continued the molestation when the family moved to their first home on Valle Avenue (Valle 1). When E. was in the sixth grade, he had sexual intercourse with her on the floor in the bedroom she shared with her brother while her brother was at the store. On two other occasions, he had sexual intercourse with her in the bathroom and in his bedroom.
>
> E. also described an incident at Valle 1 when Fernandez asked E.'s mother to bring his socks into the bathroom. Her mother told E. to bring the socks, and when E. did so, Fernandez locked the bathroom door and had sexual intercourse with E. Fernandez instructed E. to tell her mother that she had stayed in the bathroom because she was "peeing." Fernandez also engaged in anal intercourse with E. on one occasion in the bathroom at Valle 1 when no one else was at home.
>
> Fernandez also molested E. at their second home on Valle Avenue (Valle 2), when she was about 13 or 14 years old. At this residence, E. had her own bedroom upstairs while her parents' bedroom was downstairs. When her mother and brother were asleep at night, Fernandez came upstairs to E.'s bedroom, put his mouth on her breast, and had sexual intercourse with her on the floor. He

told her not to make noise because she would wake up her brother. Fernandez repeated this conduct on several other occasions.

Apart from the sexual intercourse, on various occasions while living at Valle 2 Fernandez touched E.'s breasts and grabbed her buttocks. When she was in about the eighth grade, he touched her breasts and buttocks while she was in her bedroom in the afternoon. When she was in about the ninth grade, he touched her breasts while she was in the living room.[1/]

In addition to the sexual abuse directed at E., Fernandez physically abused E., her mother, and her brother. In March and April 2004, E. was hospitalized after she attempted suicide. On June 4, 2004, Fernandez had a therapy session with a psychiatrist who had been treating him for psychological problems associated with his work-related injury. On June 7, 2004, Fernandez unexpectedly called the psychiatrist and told him that "there was more to say, that he hadn't dared to say before." Fernandez, sounding worried and ashamed, told the psychiatrist that about two and one-half years earlier he had "touched [E.] all over." When queried by the psychiatrist, Fernandez admitted that he had touched parts of her body (for example, her legs), but denied having sex. The psychiatrist interpreted Fernandez's statements to mean that he had touched her body with his hands for sexual satisfaction, and reported the information to Child Protective Services (CPS).

A medical examination of E.'s vaginal and anal areas in July 2004 showed normal results with no sign of injury. According to a defense expert, her hymen (tissue at the vaginal opening) was intact. Testifying for the prosecution, Dr. Emma Raizman stated that the genital and anal areas of children and adolescents usually appeared normal regardless of reported sexual abuse history. She explained that physical signs of sexual abuse are rare because injuries to these areas heal quickly; the anus can expand to fit "rather large bowel movements" without any injury; and when a child reaches puberty the hymen becomes "redundant" (i.e., folded in on itself, thickened, and stretchy) which allows penetration without injury. Dr. Raizman testified that the concept that a "broken" hymen meant loss of virginity was a misconception because the hymen "almost always has some kind of opening in it" and it is not a "solid piece of tissue that's popped or broken with first intercourse."

E. told Dr. Raizman that she started menstruating when she was 10 years old, which indicated that she had an "estrogenized hymen" at the time the abuse began and made it less likely there would be signs of injury to that area. When Dr. Raizman examined E.'s hymen, she observed that it was well estrogenized, stretchy, and redundant. She acknowledged that a broken hymen cannot actually grow back, but opined that a torn hymen can fully heal and further a hymen can remain intact even with ongoing vaginal intercourse.

Disagreeing with Dr. Raizman, Dr. Leeland Lapp testified for the defense that the hymen is not designed to stretch; that estrogenation impacts the elasticity of the vagina but not the hymen; and that a normal-size penis could not enter a vagina without breaking the hymen. Dr. Lapp examined Fernandez

---

1. On cross-examination, E.'s description of the order and location of the sexual assaults occurring over the years was somewhat different than her description on direct examination. E. explained that she had trouble remembering the incidents in order.

> and determined his penis was of normal size. Dr. Lapp opined that Fernandez's penis could not have entered E.'s vagina without breaking the hymen.
>
> Persuaded by the prosecution's evidence, the jury convicted Fernandez of the charged sexual offenses.

(Lodgment 22 at 2-5.)

ARGUMENT

I.

STANDARD FOR RELIEF

Federal habeas corpus lies only to correct violations of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254; *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991). This Petition was filed in 2008, and is therefore subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Lindh v. Murphy*, 521 U.S. 320, 326-7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). An application for a writ of habeas corpus by a state prisoner may not be granted "with respect to any claim that was adjudicated on the merits" by the state courts unless adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1) and (2). "'[C]learly established Federal law' in § 2254(d)(1) 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'" *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 653, 166 L. Ed. 2d 482 (2006), quoting *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

To show that the state court unreasonably applied federal law, a petitioner must demonstrate "that the state court's application of Supreme Court precedent to the facts of his case was not only incorrect but 'objectively unreasonable.'" *Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003), quoting *Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002); *see also Williams*, 529 U.S. at 362, 410 ("[T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.") (emphasis in original). This "highly deferential standard" demands that federal courts give state court decisions "the benefit of the doubt." *Woodford*, 537 U.S. at 24. Thus, AEDPA "significantly curtails the scope of collateral review," *Earnest v. Dorsey*, 87 F.3d 1123, 1127 n.1 (10th Cir. 1996), by creating a "new, highly deferential standard for evaluating state court-rulings" on federal habeas corpus. *Lindh*, 521 U.S. at 334 n.7.

II.

THE STATE COURTS REASONABLY REJECTED FERNANDEZ'S CLAIM THAT THE TRIAL COURT DENIED HIM DUE PROCESS BY ADMITTING EVIDENCE OF PRIOR UNCHARGED CONDUCT

In claim 1, Fernandez contends he was denied due process by the trial court's admission of evidence of uncharged sexual assaults. (Pet. at 5.) Preliminarily, this claim should be denied because it is not the proper subject of federal habeas review since the Supreme Court has never held propensity evidence violates due process and so the state court's ruling was not contrary to established Supreme Court precedent. In any event, the admission of evidence of uncharged sexual assaults did not violate Fernandez's right to due process since permissible inferences could be drawn from the evidence.

A. State Court Resolution

This claim was presented to the state Court of Appeal where it was reasonably denied upon finding the evidence of Fernandez's prior uncharged sexual assaults on his wife and sister-in-law were admissible under California Evidence Code section 1108:

> I. *Admission of Uncharged Sexual Offense Evidence*
>
> Fernandez asserts the trial court abused its discretion in admitting evidence that he had committed uncharged sexual offenses involving his sister-in-law (M.) and his wife (A.).
>
> **A**. *Background*
>
> 1. *Uncharged Sexual Offense Evidence Involving Fernandez's Sister-in-Law*
>
> Prior to trial, the prosecutor moved to admit evidence of two uncharged sexual offenses involving Fernandez's sister-in-law M. that occurred when M. was sleeping at Fernandez and A.'s home. According to the prosecutor's offer of proof, the first offense occurred in 1991 or 1992 when M. was about 12 years old and the second offense occurred when M. was about 14 or 15 years old. During the first incident, M. was sleeping in bed next to A. when Fernandez got into bed and began rubbing his body against M.'s body. M. immediately got up and woke A. Fernandez claimed he thought M. was A. The second offense occurred when Fernandez touched M.'s breasts and stomach over her clothes

while she was sleeping on the couch. When M. screamed and A. turned on the light, Fernandez claimed he was looking for the door to the bathroom.

Defense counsel argued the evidence regarding M. was remote, irrelevant, and prejudicial. Arguing against remoteness, the prosecutor noted that the charged offenses began in 2000, which made the 1994 incident with M. just six years before the first charged incidents with E. Further, the prosecutor asserted the uncharged incidents with M. were not too remote when considering that the uncharged and charged incidents both involved sexual conduct with girls in the same age range.

The trial court found the uncharged offenses with M. were similar because they involved a female victim in the same age range as E. and could be viewed as involving an attempt to have sexual relations; the uncharged offenses were not more inflammatory than the charged offenses; and there was no danger of confusion or undue consumption of time. Further, the court concluded the incidents with M. were not too remote, noting that uncharged sexual offense evidence ([Cal.] Evid. Code,[2/] § 1108) was not subject to the 10-year time limitation generally applicable to uncharged domestic violence evidence (§ 1109, subd. (e)), and that the multiple sexual molestation incidents were highly relevant to show propensity.

At trial, M. testified that on one occasion when she was around 11 to 13 years old, she spent the night at her sister's house. She was sleeping in bed with her sister while Fernandez was at work. When Fernandez came home from work, he laid down on the bed next to M. and began rubbing the front of his body against the back of her body. M. woke up and got up from the bed, stating that Fernandez probably thought that she was her sister. When M. was about 14 years old, another incident occurred when she was spending the night at her sister's home. While M. was sleeping on the couch, she awoke when she felt Fernandez moving his hand on her breasts and stomach over her clothes. M. screamed, slapped Fernandez, and ran and turned on the light. Fernandez told M. he was looking for the bathroom door. According to M., the bathroom was on the opposite side of the room.

After M. testified, Fernandez moved for a mistrial on the basis that M.'s testimony revealed the uncharged sexual offenses were even more remote than believed during the in limine hearing–i.e., it appeared the first incident occurred in 1989 or 1990 rather than 1991 or 1992.[3/] The trial court rejected the assertion that remoteness required exclusion of the evidence and denied the mistrial motion.

2. *Uncharged Sexual Offense Evidence Involving Fernandez's Wife*

During the in limine hearing, the prosecutor also requested permission to present evidence of Fernandez's sexual relationship with his wife A. when A. was about 13 years old. The prosecutor explained that Fernandez married A.

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2. All statutory references are to the [California] Evidence Code.

3. During the in limine hearing, the prosecutor had estimated the dates of the incidents based on the belief that M. was currently 26 or 27 years old, whereas at trial M. testified she was born in January 1977 and was currently 29 years old.

when she was about 13 years old and he was about 21 years old, and that evidence of their early sexual relationship was relevant to show Fernandez's propensity to be sexually attracted to girls in their early teens. Defense counsel stated that if the prosecutor was allowed to present this evidence, the defense would present evidence that A.'s parents approved of the marriage and expert testimony that marriage between a young girl and an older man was not unusual in Mexican culture.

At the in limine hearing, the trial court ruled the prosecutor could not present the evidence in its case-in-chief, finding that it would result in a "mini-trial within a trial" and consume too much time, but left open the possibility that the evidence might become admissible on rebuttal. Thereafter at trial during cross-examination of A., defense counsel asked if Fernandez had ever raped A. When the prosecutor objected on relevancy grounds, defense counsel made an offer of proof that evidence of recent incidents where Fernandez had raped and sodomized his wife were relevant to show A.'s motive to retaliate against her husband. After additional discussion, the court gave defense counsel permission to question A. about Fernandez's conduct of raping and sodomizing her in the latter years of their marriage.

Based on its ruling admitting the testimony proffered by the defense, the trial court changed its earlier ruling excluding the prosecution's evidence about Fernandez's sexual relationship with A. when she was about 13 years old. The court reasoned the defense evidence about recent rape and sodomy was more inflammatory than the prosecution evidence about the early sexual relationship, and given its ruling allowing admission of the defense evidence the prosecutor should be allowed to examine A. about her entire sexual relationship with Fernandez.

Thereafter, A. testified that she met Fernandez in California when she was 12 or 13 years old and he was 20 years old. During the month of December, when A. was about 13 or 14 years old, she ran away from her mother's home in California and went to Mexico with Fernandez to get married. When A. was in Mexico, her mother provided a letter giving permission for her to get married. Fernandez and A. first had sexual intercourse at a hotel in California on their way to Mexico. They were married in July 1988 when A. was 14 years old.[4/]

B. *Analysis*

Section 1108 sets forth an exception to the general rule against the use of uncharged misconduct evidence to show a propensity to commit crimes. (*People v. Soto* [] 64 Cal. App. 4th 966, 983 [, 75 Cal. Rptr. 2d 605 (1998)].) The section allows admission of evidence of other sexual offenses when a defendant is charged with a sexual offense unless the trial court determines under section 352 that the probative value is outweighed by the danger of undue prejudice, confusion, or time consumption. (§ 1108, subd. (a); *People v. Falsetta*[, 986 P.2d 182,] 21 Cal. 4th 903, 917 [, 89 Cal. Rptr. 2d 847 (1999)].)

When considering admission of uncharged sexual offense evidence, the trial court must conduct a careful analysis under section 352 to ensure that the defendant's rights to a fair trial are safeguarded. (*People v. Falsetta, supra*, 21 Cal. 4th at pp. 916-918.) The trial court evaluates the evidence by considering

4. A. remembered that she went to Mexico with Fernandez in the month of December, but she did not remember whether this occurred in 1986 or 1987.

such factors as "its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission . . . ." (*Id*. at p. 917.) A trial court's ruling under section 352 will not be disturbed on appeal unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Frazier*[,] 89 Cal. App. 4th 30, 42[, 107 Cal. Rptr. 2d 100 (2001)].)

To support his contention that the trial court abused its discretion in admitting the uncharged sexual offense evidence, Fernandez asserts the sexual conduct with his sister-in-law and his wife was qualitatively different from the charged sexual offenses because the uncharged conduct did not "reflect forcible sexual intercourse with an unwilling victim." He asserts the sexual conduct with M. appeared to have been based on mistakes and it did not involve attempts to isolate her or threaten or trick her into sexual conduct, and that he stopped the conduct as soon as she protested. He argues his sexual relationship with his wife A. when she was 13 or 14 years old was entirely consensual, was sanctioned by A.'s mother, and did not reflect a predisposition to commit a crime.

There is no strict similarity requirement for admission of sexual offense evidence under section 1108. (See *People v. Frazier, supra*, 89 Cal. App .4th at pp. 40-41; *People v. Soto, supra*, 64 Cal. App. 4th at pp. 984, 991.) In any event, there are significant similarities between the uncharged and charged incidents. All involve sexual conduct with a female family member in the preteen or early teen years. Although the conduct with M. did not involve sexual intercourse, it was nonconsensual and could have led to more invasive contact had M. not resisted. Even if at the time of the first incident M. may have believed Fernandez's conduct arose from a mistake, M. construed the second incident as intentional sexual contact and the record supports this view. From this latter evidence, the jury could reasonably infer the first incident was likewise intentionally directed at M. Because a fact finder could reasonably find the incidents involving M. were not the result of mistake, the trial court was not required to find they were qualitatively different from the charged offenses on this basis so as to compel exclusion. Additionally, the fact that Fernandez's conduct with M. did not involve such factors as isolation, threats or force did not render the uncharged and charged offenses so dissimilar as to require exclusion. The dissimilarities between the conduct with M. and with E. went to the weight, not the admissibility, of the uncharged sexual offense evidence. (*People v. Mullens*[,] 119 Cal. App. 4th 648, 659-660[, 14 Cal. Rptr. 3d 534 (2004)].)

Regarding A., although Fernandez's premarital sexual contact with her when she was about 13 years old was consensual, the evidence was relevant to show Fernandez's propensity to be sexually attracted to girls in their early teen years. The trial court exercised its discretion to admit this evidence only after the defense was allowed to present evidence of the violent nature of the sexual relationship during the later years of the marriage. When balancing probative value with such factors as prejudice and time consumption, it was not unreasonable for the trial court to conclude that once it allowed the defense to

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> delve into the violent aspects of the later sexual relationship, the balance tipped in favor of allowing the prosecution to present evidence regarding the early sexual relationship.
>
> Fernandez also argues the trial court should have excluded the uncharged sexual offense evidence because it was remote. As noted by the trial court, unlike the admission of uncharged domestic violence evidence, the Legislature has not established a specific time limitation for uncharged sexual offense evidence. (§§ 1109, subd. (e), 1108; see *People v. Branch*[,] 91 Cal. App. 4th 274, 284[, 109 Cal. Rptr. 2d 870 (2001)].)[5/] The courts have recognized that the passage of a substantial length of time does not necessarily require exclusion of uncharged sexual offense evidence. (*People v. Soto, supra*, 64 Cal. App. 4th at pp. 991-992.) Fernandez's sexual activity with 13- or 14-year-old A. occurred in about 1986 or 1987; his sexual contact with M. occurred in about 1989 or 1990 and then again in about 1991 or 1992; and the charged sexual activity with E. began in 2000. Thus, the evidence shows a repeated pattern of sexual contact with female family members in their preteen or early teen years, with only about an 8- or 9-year break between the last incident with M. and the first charged incident with E. (See *People v. Frazier, supra*, 89 Cal.App.4th at p. 41 [uncharged sexual offenses were not too remote based on pattern of molesting young female relatives starting 20 years earlier].) Under these circumstances, the trial court did not abuse its discretion in finding the uncharged sexual offense evidence was not too remote.
>
> Finally, Fernandez asserts in summary fashion that the uncharged sexual offense evidence was inflammatory, confusing, distracting, and unduly time consuming. The record does not show an abuse of discretion on these grounds. Fernandez's challenge to the admission of the uncharged sexual offense evidence fails.

(Lodgment 22 at 5-13.) The Court of Appeal impliedly and reasonably rejected Fernandez's claim of due process error by not responding to his claim in the opinion and citing *People v. Falsetta*, 21 Cal. 4th 903, 986 P.2d 182, 193, 89 Cal. Rptr. 847 (1999), which held the admission of propensity evidence does not violate due process. (Lodgment 22.) Fernandez presented the same claim in a Petition for Review to the California Supreme Court where it was summarily denied. (Lodgments 23 & 24.)

B. The State Court's Resolution Was Not Contrary To Supreme Court Precedent

The question of whether evidence of prior uncharged acts was properly admitted under California law is not cognizable on federal habeas review. *Estelle*, 502 U.S. at 67. "A writ of habeas corpus is available under 28 U.S.C. § 2254(a) only on the basis of some transgression of

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5. Section 1109, subdivision (e) requires exclusion of domestic violence evidence that occurred more than ten years before the charged offense unless the interests of justice warrant admission.

federal law binding on the state courts. It is unavailable for alleged error in the interpretation or application of state law." *Featherstone v. Estelle*, 948 F.2d 1497, 1500 (9th Cir. 1991), quoting *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985); *see also Estelle*, 502 U.S. at 67-68; *Johnson v. Sublett*, 63 F.3d 926, 931 (9th Cir. 1995) (stating that state law foundational and admissibility questions raise no federal question). Federal courts presume that state courts have properly applied their own law. *Woratzeck v. Stewart*, 97 F.3d 329, 336 (9th Cir. 1996). This Court must accept the state court's interpretation of its own law. *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996). But even an error of the trial court in admitting evidence under California law does not violate the Constitution and cannot be the basis for federal habeas relief. *Hendricks v. Vasquez*, 974 F.2d 1099, 1105 (9th Cir. 1992); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Thus, this Court may not reexamine whether the state courts properly applied California Evidence Code section 1108 because this is an issue of state law for which there is no federal review. *See Bradshaw v. Richey*, 546 U.S. 74, 126 S. Ct. 602, 604-05, 163 L. Ed. 2d 407 (2005); *Estelle*, 502 U.S. at 67-68.

Even assuming for argument's sake that this Court were to conclude that each state court unreasonably erred regarding the evidence, Fernandez cannot prevail because the United States Supreme Court has never granted relief on, and has expressly declined to address, the question of whether propensity evidence may violate due process. *Alberni v. McDaniel*, 458 F.3d 860, 863-67 (9th Cir. 2006) (citing *Estelle*, 502 U.S. at 74-75 n.5). The Supreme Court's silence on an issue governed by the AEDPA should preclude habeas relief. *Carey*, 127 S. Ct. at 654; *Alberni*, 458 F.3d at 866-67; *see Mitchell v. Esparza*, 540 U.S. 12, 17-18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (federal courts exceed their authority when relying on the absence of Supreme Court precedent to support a habeas corpus ruling); *Stuard v. Stewart*, 401 F.3d 1064, 1067 (9th Cir. 2005) (a petitioner "needs a Supreme Court decision").

The Ninth Circuit addressed the issue of whether the admission of propensity evidence violates due process in *Alberni*, 458 F.3d 860:

> The circumstances of this case are more like those present in *Earp*[*v. Ornoski*, 431 F.3d 1158 (9th Cir. 2005)], in which we declined to declare a constitutional principle clearly established after the Supreme Court had expressly concluded

> the issue was an "open question." *Earp*, 431 F.3d at 1185. We held in *Earp* that "the advent of AEDPA forecloses the option of reversing a state court determination because it conflicts with circuit law." *Id*. We cannot conclude that the Nevada Supreme Court acted in an objectively unreasonable manner in concluding that the propensity evidence introduced against Mr. Alberni did not violate due process, given that *Estelle* expressly left this issue an "open question."
>
> The right Mr. Alberni asserts has not been clearly established by the Supreme Court, as required by AEDPA.

Alberni, 458 F.3d at 866-67.

"This Court is bound by the reasoning in *Alberni* and must also conclude that habeas relief cannot be granted on the claim that admission of propensity evidence in this case violated due process because the question has not been resolved by the Supreme Court." *Ramirez v. Subia*, No. CIV S-06-2167-LKK-CMK-P, 2008 U.S. Dist LEXIS 28512, at *10 (E.D. Cal. Apr. 4, 2008).

Federal habeas corpus relief is available if the trial court's admission of evidence was arbitrary or so prejudicial that the evidence rendered the trial so fundamentally unfair as to violate due process. *Estelle*, 502 U.S. at 75; *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995) ("A state court's procedural or evidentiary ruling is not subject to federal habeas review unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process.") The category of infractions that violate "fundamental fairness" has been defined "very narrowly." *Estelle*, 502 U.S. at 73. The fact that evidence may have been more prejudicial than probative will not entitle a petitioner to federal habeas relief. *Hendricks*, 974 F.2d at 1105; *Jammal*, 926 F. 2d at 919. Thus, while adherence to state evidentiary rules suggests that the trial was procedurally fair, it is certainly possible to have a fair trial even when state standards are violated. *Dubria v. Smith*, 224 F.3d 995, 1001-02 (9th Cir. 2000) (en banc); *Jammal*, 926 F. 2d at 919 (citing *Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983)); *see also Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985) (Ninth Circuit found that, even if admission of petitioner's alleged uncharged attempt to kill his wife by causing a gas explosion was erroneous under state rules of evidence, it was not so prejudicial as to be unconstitutional).

Although the Ninth Circuit has not yet addressed the constitutionality of California

Evidence Code section 1108, it has held that corresponding Federal Rule of Evidence 414 does not violate due process. *United States v. LeMay*, 260 F.3d 1018, 1027 (9th Cir. 2001). Rule 414 governs the admissibility of evidence of prior conduct in cases of child molestation and this, is similar to California Evidence Code section 1108. The *LeMay* court ruled that Rule 414 did not violate due process because Rule 403 (the federal equivalent to California Evidence Code section 352) served as a filter to exclude evidence that is so prejudicial as to deprive the defendant of his right to a fair trial. *Id.* at 1026. The "application of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414." *Id.* at 1027, quoting *United States v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998).

California Evidence Code section 1101 provides, in relevant part:

> (a) Except as provided in this section and Section[ ] . . . 1108 . . . , evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than his or her disposition to commit such an act.

California Evidence Code section 1108, subdivision (a) provides, in relevant part, that "in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." California Evidence Code section 352 permits the court to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of under prejudice, of confusing the issues, or of misleading the jury."

Here, as found by the state Court of Appeal, the trial court properly performed the analysis required by California Evidence Code sections 352 and 1101 before admitting the evidence. Specifically, the court found "the evidence was relevant to show Fernandez's propensity to be sexually attracted to girls in their early teen years," and such relevance was not outweighed by potential prejudice. (Lodgment 22 at 12-13.) Therefore, the state courts correctly held that the evidence was properly admitted. Because the jury could draw permissible inferences from this evidence, no due process violation occurred in the admission of the evidence. *Houston v. Roe*, 177

F.3d 901, 910 n.5 (9th Cir. 1999); *Jammal*, 926 F.2d at 920 (only if no permissible inferences can be drawn from admitted evidence will due process be violated). Fernandez is not entitled to habeas relief.

III.

THE STATE COURTS REASONABLY DENIED FERNANDEZ'S CLAIM THAT HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE WAS DENIED BY THE PARTIAL EXCLUSION OF THE DEFENSE EXPERT'S TESTIMONY

In claim 2, Fernandez alleges that he was denied his due process right to present his defense by the trial court's partial exclusion of the testimony of defense expert Dr. Constance Dalenberg. (Pet. at 5.) Fernandez's rights to due process and to present a defense do not include the right to present inadmissible evidence. Accordingly, the state Court of Appeal reasonably denied Fernandez's claim upon finding the excluded testimony inadmissible.

A. State Court Resolution

Fernandez presented this claim to the state Court of Appeal where it was reasonably rejected upon finding the excluded testimony was outside the scope of proper expert testimony:

> II. *Exclusion of Portions of Defense Expert Testimony*
>
> The trial court excluded portions of a defense expert's testimony which the trial court viewed as improperly presenting the jury with the expert's opinion that E.'s sexual abuse accusations were false. We conclude the trial court did not abuse its discretion in partially excluding the expert's testimony.
>
> A. *Background*
>
> Prior to trial, Fernandez's counsel obtained permission to present the expert testimony of Dr. Constance Dalenberg on the issue of false reporting of sexual abuse by a child against a parent. Defense counsel stated Dr. Dalenberg would testify regarding clinical studies showing a statistical increase in false reporting based on factors such as divorce, domestic violence, and retaliation for unduly strict discipline. Defense counsel explained the evidence was relevant to the defense theory that Fernandez's wife and children wanted him out of the house because he was abusive and tyrannical, and they saw a way of getting him out and retaliating against him by fabricating the claims that he had engaged in "full blown" vaginal and anal intercourse with E., even though the evidence showed no physical findings of such penetration.
>
> Defense counsel posited the expert testimony was necessary because although jurors may know from common experience that false accusations happen, they may not understand the factors that contribute to false reports. The prosecutor had no objection to the proffered evidence, with the

understanding that the expert would not be asked whether she believed the victim was telling the truth.

During Dr. Dalenberg's trial testimony, problems emerged with the manner in which she was questioned and with the answers she presented. The prosecutor and the trial court were concerned that Dr. Dalenberg was in effect giving the jury her opinion that E. was lying about the sexual abuse. The court called a recess during Dr. Dalenberg's testimony to discuss the matter with the parties. After this discussion and out of the presence of the jury, the court admonished Dr. Dalenberg that she could give research information about factors associated with false reporting, but she should not give her opinion about the value of the evidence or the credibility of witnesses in this particular case. Dr. Dalenberg resumed her testimony with no further admissibility problems.

Thereafter, the court reviewed Dr. Dalenberg's testimony that had been presented to the jury prior to the recess, and concluded that portions of her testimony constituted an improper opinion on E.'s credibility. As we shall delineate below, the court struck portions of her testimony and instructed the jury not to consider any expert testimony giving an opinion about a witness's credibility.

The portions of Dr. Dalenberg's testimony that were admitted without admissibility problems included the following. Dr. Dalenberg testified that research on child sexual abuse revealed that about 3 to 8 percent of accusations in cases not involving a child custody dispute are false, and about 15 percent are false when there is a child custody or other type of dispute between the parents. Dr. Dalenberg explained that false reporting can arise from such factors as disassociation (memory disruptions in an abused child); a child's suggestibility; a child's reality testing problems (i.e., hallucinations or hearing voices); the use of leading questions during an interview with a child; and parental conduct of modeling extreme accusations and lying. She testified that disassociation is evidenced when a child presents contradictory accounts within a short period of time without noticing the contradictions, and suggestibility is demonstrated when a child attempts to answer questions in a manner that corresponds with what the examiner is trying to elicit from the child. Additional factors indicative of false reporting include a child's history of defiance (i.e., "acting out" against authority) and a family motive (such as anger) for a particular outcome.

The problematic portions of Dr. Dalenberg's testimony, which were ultimately struck from the record by the trial court, included the following. Dr. Dalenberg testified that she had reviewed the transcript of E.'s testimony at the preliminary hearing, police reports, a hospital report, E.'s statements in a tape-recorded interview by a detective, and notes from E.'s CPS file. Defense counsel asked Dr. Dalenberg if she had "direct evidence of lying," and Dr. Dalenberg responded that E. told "remarkably different stories" in the preliminary hearing transcript, CPS reports, and police interviews. Dr. Dalenberg explained that it was normal for a child to make inconsistent statements, but that E.'s inconsistencies were "much more extreme" than normal; that the number of her contradictions was much higher than in the research samples of both accurate and inaccurate reports; and that her contradictions were not characteristic of accurate reports.

Defense counsel then asked: "If [E.] was changing her story and not catching herself, if she seems to say different things to me, different things to the police, different things to the DA–if you have her mother saying she was saying she was hearing voices, what does research say about that scenario?" The prosecutor objected to this question and the trial court sustained the objection. Defense counsel continued, asking, "In that situation is that a high-risk kid who is most likely to be falsely testifying?" and the trial court again sustained the prosecutor's objection. At another point, defense counsel asked: "What about the child having a motive to lie?" Dr. Dalenberg commenced answering: "According to the records that I looked at here, talking to CPS and police-." Interrupting her answer, the trial court sustained the prosecutor's objection.

After concluding the jury had heard improper expert opinion testimony on witness credibility, the trial court struck the portions of Dr. Dalenberg's testimony where she stated she reviewed the reports for E.'s case and where she specifically referred to E.'s statements or testimony. The court advised counsel that in their arguments to the jury they could not refer to these stricken aspects of the expert's testimony, although they were free to argue about how the factors identified by the expert applied to the jury's credibility determination.

The trial court also gave the following special instruction to the jury: "[E]xperts are permitted to give opinions, they are also permitted to talk to you about studies. They are not permitted to give you their opinion about the credibility of the witnesses that have testified before you. If you find that an expert gave an opinion about a witness in this case, you are to disregard it because it is you who must determine the credibility of the witnesses in this case. That [is] the ultimate question, and that is the jury's function."

Fernandez contends the trial court's ruling excluding parts of Dr. Dalenberg's testimony was an abuse of discretion that violated his due process right to present a defense. He asserts that the excluded portions of Dr. Dalenberg's testimony did not constitute an express or implied opinion on E.'s veracity.

B. *Governing Legal Principles*

To be admissible, expert opinion testimony must be "[r]elated to a subject that is sufficiently beyond common experience" so that the opinion "would assist the trier of fact." ([Cal. Evid.] § 801, subd. (a).) If expert opinion evidence addresses a matter beyond common experience, it is admissible even if it encompasses an ultimate issue in the case. (*People v. Olguin*[,] 31 Cal. App. 4th 1355, 1371[, 37 Cal. Rptr. 2d 596 (1994); Cal. Evid.] § 805.) However, expert opinion testimony is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the expert. (*People v. Torres*[,] 33 Cal. App. 4th 37, 45[, 39 Cal. Rptr. 2d 103 (1995)].) "[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. 'Where the jury is just as competent as an expert to consider and weigh the evidence and draw the necessary conclusions, then the need for the expert testimony evaporates.' "(*Id.* at p. 47.) Thus, "the decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole*[, 301 P.2d 854,] 47 Cal. 2d 99, 103 [(1956)].)

Generally, an expert may not give an opinion whether a witness is telling the truth because the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact. (*People v. Coffman and Marlow*[, 96 P.3d 30,] 34 Cal. 4th 1, 82[, 17 Cal. Rptr. 3d 710 (2004).) "[T]he jury generally is as well equipped as the expert to discern whether a witness is being truthful." ([*Id.*]) Thus, in *Coffman*, the court found it was improper for an expert to testify that she believed the witness's reports of abuse were true. (*Id.* at pp. 25, 82 & fn.26.)

However, an expert may present testimony relating to credibility that addresses matters sufficiently beyond common experience so that it would assist the jury. (See *People v. Ward*[, 114 P.3d 717,] 36 Cal. 4th 186, 211[, 30 Cal. Rptr. 3d 464 (2005)]; *People v. Brown*[, 94 P.3d 574,] 33 Cal. 4th 892, 908[, 16 Cal. Rptr. 3d 447 (2004)]; *People v. McDonald*[, 690 P.2d 709, [37 Cal. 3d 351, 370-371, [208 Cal. Rptr. 236 (1984),] overruled on other grounds in *People v. Mendoza*[, 4 P.3d 265,] 23 Cal. 4th 896, 914[, 98 Cal. Rptr. 2d 431 (2000)].) For example, in *Coffman*, a case involving admission of battered women's syndrome evidence, the court noted that the expert could properly explain "with reference to her expert knowledge, certain aspects of [the witness's] behavior that a layperson might find irreconcilable with her claim to have been battered." (*People v. Coffman and Marlow, supra*, 34 Cal. 4th at p. 82; see also *People v. McAlpin* (1991) 53 Cal. 3d 1289, 1299-1300, 1302 [expert could properly testify that it was not unusual for a parent to delay in reporting child molestation to authorities because jurors relying on common experience might believe a parent would promptly report abuse]; *People v. Stoll*[, 783 P.2d 698,] 49 Cal. 3d 1136, 1149, 1154[, 265 Cal. Rptr. 111 (1989)] [expert could properly testify regarding results of defendant's personality test that were inconsistent with charged misconduct because jury would not otherwise be aware of this information].)

On appeal, we apply the abuse of discretion standard to review a trial court's admission or exclusion of expert opinion testimony. (*People v. Smith*[, 68 P.3d 302,] 30 Cal. 4th 581, 627[, 134 Cal. Rptr. 2d 1, (2003)].) The courts recognize that this area is not subject to hard and fast rules, and the fact that a particular aspect of an expert's opinion is admitted in one case does not necessarily mean it must be admitted in another case. (*Id.* at p. 627; *People v. Wilson*[, 153 P.2d 720,] 25 Cal. 2d 341, 349 [(1944)].) "The circumstances in which evidence is offered and its exact nature, and the exercise of the trial court's discretion, can vary from case to case." (*People v. Smith*, *supra*, 30 Cal. 4th at p. 627.) The guiding principles are that the trial court should admit expert opinion testimony that would help the jury because it refers to matters requiring some expertise, but should exclude the opinion testimony if it merely addresses matters the jury can fully understand and judge for itself. (See *id.* at p. 628; *Wilson, supra*, at p. 349.)

C. *Analysis*

The record does not show the trial court abused its discretion in concluding that the portions of Dr. Dalenberg's statements addressing E.'s specific case concerned matters of credibility that could be resolved by the jury without expert assistance.

Dr. Dalenberg testified in general fashion that false reporting based on disassociation may be evinced when a child presents contradictory accounts within a short period of time without noticing the contradictions. Thereafter, she opined that E.'s claims of sexual abuse were not characteristic of accurate reports because her reports contained many more contradictions than any of the research samples involving both true and false sexual abuse reports. Defense counsel then attempted unsuccessfully to elicit Dr. Dalenberg's opinion about whether E.'s contradictory stories and reports about hearing voices suggested she was falsely reporting the sexual abuse. Defense counsel also inquired about a child's motive to lie, and Dr. Dalenberg was prevented from answering this question based on information gleaned from the CPS and police records in E.'s case.

Fernandez contends that Dr. Dalenberg did not render an opinion about E.'s credibility when testifying about the excessive number of contradictions in E.'s reports of sexual abuse. The contention is unavailing. The clear import of Dr. Dalenberg's statement about E.'s contradictions was that she was not credible because her reports contained too many contradictions to be accurate. Similarly, it is apparent that defense counsel's question about E. hearing voices was designed to elicit an opinion that E.'s claims were false because she was suffering from reality testing problems. Dr. Dalenberg's attempted response to the question about a motive to lie based on the information in the CPS and police records was likewise directed towards presenting an opinion that E. was not credible given factors reflected in the case history.

Dr. Dalenberg's opinions suggesting that E. was not credible were admissible only to the extent that they would have provided the jury with information sufficiently beyond common experience so that they would have assisted the jury. Fernandez does not argue, nor does the record show, that it was unreasonable for the trial court to find that the jury could decide, without expert assistance, whether the falsity of E.'s accusations was shown by excessive contradictions in her pretrial statements, evidence that she was hearing voices, and factors in her case history indicating she had a motive to lie. Based on Dr. Dalenberg's general testimony that disassociation, reality testing problems, and family dynamics can contribute to the creation of false reports, the jury was apprised of factors that can cause false reporting. From this expert evidence, combined with the evidence presented regarding E.'s pretrial statements, behavior, and family history, the jury was in a position to consider how these various factors applied to E.'s case when evaluating E.'s credibility.

The record does not show that the jury needed additional information from Dr. Dalenberg to apply the factors associated with falsity to E.'s particular case. For example, there was no showing that research had been conducted to evaluate what constitutes an extremely high number of contradictions so as to indicate falsity and that E.'s contradictions fell into a category associated with falsity. In the absence of a correlation between Dr. Dalenberg's opinion on the number of contradictions and research results, the trial court could reasonably conclude Dr. Dalenberg's statement on this point was merely a reflection of her personal opinion and that this was an assessment the jury was fully capable of, and should be, making on its own. The same conclusion applies to opinions about hearing voices or a motive to lie. There is nothing to indicate that information beyond the jury's common knowledge and experience was needed to apply these factors to E.'s particular case.

The trial court reasonably concluded that Fernandez was able to fully present his theory of defense based on expert testimony generally describing the factors that can contribute to the creation of false reports, and that the jury did not need expert opinion testimony about how these factors applied to the

> particular circumstances of E.'s case. Fernandez has not shown he was deprived of his due process right to present a defense based on the trial court's limitations on the defense expert's testimony. (See *People v. Frederick*[,] 142 Cal. App. 4th 400, 412[, 48 Cal. Rptr. 3d 585 (2006)].)

(Lodgment 22 at 13-22.) Fernandez also presented this claim in a Petition for Review in the California Supreme Court that was summarily denied. (Lodgments 23 & 24.)

B. The State Court's Opinion Was Not Contrary To Nor An Unreasonable Application Of United States Supreme Court Precedent

The Constitution guarantees an accused a meaningful opportunity to present a complete defense. *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). However, an accused does not have "an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The exclusion of evidence violates due process if the excluded evidence is both highly reliable and relevant to the defense or where the application of the evidentiary rule in question is not rationally related to its intended purpose. *Holmes*, 547 U.S. at 330-31; *Green v. Georgia*, 442 U.S. 95, 97, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979); *Chambers v. Mississippi*, 410 U.S. 284, 300-02, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Expert testimony can be excluded based on judicial determination of reliability. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). "[T]he trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35, 82 S. Ct. 1119, 8 L. Ed. 2d 313 (1962) (citing *Congress and Empire Spring Co. v. Edgar*, 99 U.S. 645, 658, 25 L. Ed. 487 (1878)).

> [E]xpert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation . . . ."

Salem, 370 U.S. at 35, quoting *United States Smelting Co. v. Parry*, 166 F. 407, 411, 415 (8th Cir.

1909).

Expert testimony "about general behavior characteristics that may be exhibited in children who have been sexually abused" is admissible when "limited 'to a discussion of a class of victims generally.'" *United States v. Antone*, 981 F.2d 1059, 1062 (9th Cir. 1992), quoting *United States v. Hadley*, 918 F.2d 848, 852 (9th Cir. 1990), *cert. dismissed*, 506 U.S. 19, 113 S. Ct. 486, 121 L. Ed. 2d 324 (1992); *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985). Such evidence is admissible to assist the trier of fact in understanding the evidence, but may not improperly bolster the particular testimony of the child victim. *Antone*, 981 F.2d at 1062; *see Hadley*, 918 F.2d at 852-53. Thus, an expert may not testify about the particular testimony of the child victim in their case. *United States v. Bighead*, 128 F.3d 1329, 1331 (9th Cir. 1997); *Hadley*, 918 F.2d at 852; *Antone*, 981 F.2d at 1062.

The state Court of Appeal reasonably applied established Supreme Court authority when finding portions of the expert's testimony were properly excluded. Dr. Dalenberg was permitted to testify to the general statistics regarding false reporting of child abuse and the underlying factors associated with false reporting, including contradictions and hearing voices. (Lodgment 22 at 15-16.) However, Dr. Dalenberg could not testify to the victim's credibility because that was an issue to be resolved by the jury. (Lodgment 22 at 20.) The Court of Appeal reasonably found Dr. Dalenberg crossed the line of proper expert testimony when she applied the victim's circumstances to the factors of false reporting and rendered the opinion that the victim was not truthful. (Lodgment 22 at 21-22.) Accordingly, portions of Dr. Dalenberg's testimony were properly excluded. The Court of Appeal likewise reasonably found Fernandez was not denied his due process right to present a defense since the excluded portions of Dr. Dalenberg's testimony were inadmissible. (Lodgment 22 at 22.) Fernandez should be denied habeas relief since the Court of Appeal's decision was a reasonably application of Supreme Court authority.

IV.

FERNANDEZ IS NOT ENTITLED TO AN EVIDENTIARY HEARING

A federal evidentiary hearing is not necessary when the petitioner's allegations are not sufficient to justify relief, such as where a state court's factual determinations are reasonable under 28 U.S.C. § 2254(d). *See Davis*, 333 F.3d at 994. A federal evidentiary hearing may be appropriate, however, if the petitioner relies on evidence that is not in the state-court record and if the petitioner has not "failed to develop" the claim in the state-court proceedings. *Williams*, 529 U.S. at 424; *see Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999).

The California courts previously heard Fernandez's claims and made reasonable factual determinations under 28 U.S.C. § 2254(d). Moreover, Fernandez's claims do not rely on any evidence that is not in the state-court record, and does not present the need to further develop evidence in additional proceedings. Therefore, an evidentiary hearing is not warranted in this matter.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests the Petition for Writ of Habeas Corpus be denied with prejudice and any request for a Certificate of Appealability be denied.

Dated: July 11, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: *Fernandez v. Martel* No.: **08-0816 JLS (CAB)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 11, 2008, I served the following documents:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case:

NONE

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

Alberto Fernandez
CDC #F-25887
Mule Creek State Prison
P. O. Box 409040
Ione, CA 95640
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 11, 2008, at San Diego, California.

Maria G. Stawarz	[signature]
Declarant	Signature

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